NO. 79356-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD H. WARREN,

Petitioner.

Portions of this brief were rejected by the assignment Justice.

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Decisions

Other States

United States Constitution

Washington Constitution

Washington Statutes

Court Rules

Other Authorities

TABLE OF AUTHORITIES

C. ARGUMENT

1. THE SENTENCING ORDER PROHIBITING WARREN FROM CONTACT WITH HIS WIFE IS NOT CRIME-RELATED AND UNCONSTITUTIONALLY INTEFERES WITH HIS RIGHTS TO PRIVACY AND FREEDOM OF ASSOCIATION

Warren was convicted of sexually assaulting his two step-daughters, but sentencing court ordered him to have no contact with his wife for life and included no contact with her as a condition of community supervision. CP 68. 73. Mrs. Warren did not request the no-contact order, and the sentencing court did not consider the impact of the no-contact order on the Warrens' marriage. This Court should strike the no-contact order because it is not a crime-related prohibition and because it unconstitutionally interferes with Warren's constitutional right to privacy in his marriage.

a. The no-contact order is not authorized by the SRA because it is not crime-related. The superior court's authority to sentence an offender is governed by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782, 784 (2007). Under the Sentencing Reform Act (SRA) the sentencing court may impose and enforce "crime-related prohibitions and affirmative conditions as provided in this chapter." RCW

9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 112, 156 P.3d 201 (2007).

A "crime related prohibition" must be directly related to the circumstances of the offense for which the defendant is being sentenced:

> "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(13) (Effective until July 1, 2007).[6] (Emphasis added). "The philosophy underlying the 'crime-related' provision is that '[p]ersons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them.'" State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993), quoting David Boerner, Sentencing in Washington § 4.5, at 4-7 (1985). Thus, this Court upheld sentencing conditions for a first-time offender convicted of computer trespass that included prohibiting him from possessing a computer, associating with computer hackers, or communicating with

[6] The sentencing court must apply the statutes in effect at the time of the offenses. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). RCW 9.94A.030 has been amended several times since the charging period for these offenses, changing the numbering of the subsections but not the definition of "crime-related prohibition." Warren refers to the current numbering for convenience.

computer bulletin boards. Id. at 37-38. Similarly, an order prohibiting contact with any children is appropriate for a defendant convicted of raping a child, but not a defendant sentenced for rape of an adult woman. State v. Riles, 135 Wn.2d 326, 347, 349-50, 957 P.2d 655 (1998).[7]

Here, the sentencing court imposed the order prohibiting Warren from any contact with his wife because Mrs. Warren testified on behalf of the State and because "Mr. Warren showed during the course of this trial -- showed a lot of controlled [sic] behavior towards her. It was inappropriate." 3/19/04RP 27. The primary evidence of controlling behavior that prior to the first trial Mrs. Warren took the girls out of school and avoided the subpoenas based upon Warren's suggestion. 11/13/03RP 80, 111-13. Thus, the no-contact order was not premised upon manipulation during the period of time when the crime occurred but because the court suspected Warren of later witness tampering. The no-contact order with Mrs. Warren was therefore not a crime-related prohibition that could lawfully be imposed as part of an SRA sentence.

b. The no contact order improperly infringed upon Warren's constitutional rights to privacy and free association. The Fourteenth Amendment of the United States Constitution provides that no State shall

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[7] Accord State v. Parramore, 53 Wn.App. 527, 532, 768 P.2d 530 (1989) (offender convicted of selling marijuana could be ordered to submit to urinalysis (to test for illegal drugs) but not authorize breathalyzer testing (to test for alcohol)).

"deprive any person of life, liberty, or property, without due process of law." The clause includes a substantive component, which provides heightened protection against government interference with certain fundamental rights and liberty interests.[8] Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The rights to marry and to privacy in marriage are long-standing and fundamental constitutionals right protected by the Fourteenth Amendment. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Anderson v. King County, 158 Wn.2d 1, 24, 138 P.3d 963 (2006).[9]

Here the court order interferes with Warren's constitutional right to privacy in his marriage. While a convicted defendant's constitutional rights are subject to limitation while he is in prison or on community placement, his constitutional right to free association may only be restrained as "reasonably necessary to accomplish the essential needs of the state and the public order." Riles, 135 Wn.2d at 347, quoting Riley,

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[8] Similar protections are afforded by the Washington Constitution. Article 1, section 3 reads, "No person shall be deprived of life, liberty, or property, without due process of law." Article 1, section 7, reads, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The enumeration of certain rights in the state constitution "shall not be construed to deny others retained by the people." Wash. Const. art. 1, § 30.

[9] Accord Zablocki v. Redhail, 434 U.S. 374, 383-86, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.23d 674 (1992) (Fourteenth Amendment protects personal decisions concerning family life); Griswold v. Connecticut, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (right of privacy in marriage older than Bill of Rights).

121 Wn.2d at 37-38; State v. Ancira, 107 Wn.App. 650, 654, 27 P.3d 1246 (2001). Thus, sentencing conditions prohibiting a sex offender from contact with her children were found to unconstitutionally limit her fundamental right to parent given the absence of evidence she was a danger to her children.[10] State v. Letourneau, 100 Wn.App. 424, 441-42, 997 P.2d 436 (2000).

The sentencing court did not address the impact of the order on the Warren's marriage or their constitutional right to privacy, nor did the court consider any less restrictive options. 3/19/04RP 27. It is unclear from the sentencing hearing if Mrs. Warren even wanted a no-contact order.[11] 3/19/04RP 23. There is no evidence the no-contact order was reasonably necessary to protect the needs of the state.

As a practical matter, the court orders prohibiting Warren from contacting N.S. and S.S. necessarily limit Warren's contact with his wife while she is their custodial parent. Warren's long prison term will also limit the marriage, as prisons may regulate but not eliminate a prisoner's

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[10] In two cases where defendants were sentenced for forms of domestic violence against their wives, the Court of Appeals also found orders prohibiting those defendants from contacting their children or limiting such contact were unconstitutional. State v. Sanford, 128 Wn.App. 280, 288-89, 115 P.3d 368 (2005) (striking order permitting only supervised contact with children; children had not witnesses assault on mother); Ancira, 107 Wn.App. at 656 (striking order prohibiting all contact with children who may have witnesses domestic violence).

[11] Over Warren's objection, the sentencing court considered an email purportedly from Mrs. Warren in which she may or may not have addressed the no-contact order; the email was never made part of the superior court record. 3/19/04RP 2-3, 25-26.

contact with his spouse. Turner v. Safley, 482 U.S. at 95. Many important attributes of marriage, however, remain even taking into account the limitation imposed by prison life, including emotional support, spiritual commitment, and eligibility for certain government benefits, inheritance, and property rights.[12] Safley, 482 U.S. at 95-96. The order prohibiting any contact with Mrs. Warren, however, is so broad it literally prohibits Mr. Warren from asking his wife to address their child's future, their finances, or even dissolution of their marriage.

Given time and resources, a no-contact order could be crafted that would limit Warren's contact with Mrs. Warren as she felt necessary, honor the order prohibiting contact with N.S. and S.S., and yet permit contact with H.W. as appropriate. A criminal sentencing court, however, is simply not the forum for resolving these issues. Instead, family and/or juvenile court has the authority and resources needed to appropriately deal with all of the issues involved in light of the best interests of Mrs. Warren, the marriage, and H.W. See Letourneau, 100 Wn.App. at 443 (family and/or juvenile court has authority to appoint guardian ad litem for children to investigate children's best interests and authority to tailor order

[12] Some of the benefits of marriage are found in new Washington legislation extending some such rights to domestic partners. Laws of 2007 ch. 156. Others are mentioned in a recent article in the Washington State Bar News. Jill Mullins & Hugh Spitzer, "The Role of the State in Washington Marriage: Same Sex, Different Rights," 61 Washington State Bar News No. 9 at 17-21 (September 2007).

to meet best interests of children with respect to issues such as visitation with parent who has committed crime); Ancira, 107 Wn.App. at 656-57 (accord).

The courts of this state have not addressed the constitutionality of a sentencing condition prohibiting contact with an offender's spouse in situations where the spouse is not the crime victim. Oregon courts addressing the issues have held that probation conditions may include no contact with a spouse only upon (1) a factual showing that the spouse would endanger the defendant's rehabilitation and therefore public safety and (2) an investigation into alternative conditions that would serve the same purpose but cause less disruption of the marital relationship. State v. Martin, 282 Ore. 583, 580 P.2d 536, 539-40 (1978); State v. Saxon, 131 Ore.App. 662, 886 P.2d 505, 506-07 (1994). Similar conclusions have been reached in Alaska and Wyoming. Dawson v. State, 894 P.2d 672, 680-81 (Alas.App. 1995) (prohibiting offender from contacting wife without approval of his probation officer violated constitutional rights to privacy, liberty and freedom of association even though both spouses involved in drug trafficking); Hamburg v. State, 820 P.2d 523, 532 (Wyo. 1991) (condition prohibiting defendant from contacting his ex-wife as part

of sentence for forging signatures on nomination petition not reasonably related to future criminal conduct).[13]

c. The no-contact order must be stricken. This Court has held that a criminal sentencing court may restrict an offender's First Amendment right of association only as reasonably necessary to protect the needs of the state and public order. Riles, 135 Wn.2d at 350. Marriage is one of the vital personal rights protected by the constitution, yet the sentencing court prohibited Warren from any contact with his wife for life without proof that such as order was necessary to protect Mrs. Warren and without considering the impact of the order on his marriage. This Court must strike the orders prohibiting Warren from contact with his wife.

[13] Ohio courts have also addressed the issue. State v. Thompson, 150 OhioApp.3d 641, 782 N.E.2d 688 (2002) (marriage is a fundamental and vital personal right and court could not violate defendant's probation for a marriage that was not criminal or related to future criminal activity, the court held the probation condition unreasonably interfered with the probationer's right to lawful association. State v. Jahnke, 148 OhioApp.3d 77, 772 N.E.2d 156, 159 (2002) (striking 5-year no-contact order with fiancé which "encroached on appellant's fundamental rights without any concomitant rehabilitative purpose.").

2. WARREN'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

A public prosecutor is a quasi-judicial officer with a duty to act impartially and seek a verdict free from prejudice and based upon law and reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). When a prosecutor commits misconduct, the defendant's right to a fair trial and due process may be violated. Id. Here, prosecutorial misconduct in closing argument in each of his trials denied Warren a fair trial.

a. The prosecutor's misstatement of the burden of proof beyond a reasonable doubt in closing argument requires a new trial for child molestation of S.S. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. 5, 14; Wash. Cont. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The requirement that the government prove a criminal charge beyond a reasonable doubt has consistently played

an instrumental role, along with the right to a jury trial, in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

> The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principal whose "enforcement lies at the foundation of the administration of our criminal law."

Winship, 397 U.S. at 363.

i. *The prosecutor misstated the presumption of innocence and burden of proof beyond a reasonable doubt in her closing argument.*

The deputy prosecuting attorney undermined the long-standing constitutional principals of presumption of innocence and proof beyond a reasonable doubt in her rebuttal closing argument in Warren's February 2003 trial by arguing Warren did not deserve the benefit of the doubt. First, the prosecutor argued it was not reasonable for the defendant to ask the jury to "infer everything for the benefit of the defendant." 2/20/03RP 42. When Warren's prompt objection was overruled, the prosecutor stated, "Reasonable doubt does not mean give the defendant the benefit of the doubt. That is clear when you read the [reasonable doubt] instruction." Id.

Later the prosecutor returned to this theme, providing the jury with a catchy but incorrect explanation of the burden of proof beyond a reasonable doubt:

> I talked to you about the fact that you must find the defendant guilty beyond a reasonable doubt. That is the standard to be applied in the defendant's case, the same as any other case. But reasonable doubt does not mean beyond all doubt. It doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.

2/20/03RP 46-47. Warren again objected. Id. at 47. This time the court gave a limiting instruction emphasizing the jury instruction referring to the reasonable doubt instruction. The court undermined the curative instruction, however, by ending with the unfortunate comment that the prosecutor's misstatement of the instructions was simply "playing with words in a sense." Id. at 47-48.

ii. *The Court of Appeals incorrectly held the court's inconsistent curative instruction cured the prejudice caused by the prosecutor's misstatement of the burden of proof.* The Court of Appeals accepted the State's concession that the prosecutor's argument misstated the prosecutor's constitutional burden of proof, but held Warren was not prejudiced due to the court's curative instruction. Warren, 134 Wn.App. at 60. The Court of Appeals opinion suffers from two important factual inaccuracies.

First, the opinion does not mention that the trial court overruled Warren's first objection to the prosecutor's misstatement of the burden of proof, permitting the prosecutor to tell the jury it could not give Warren the benefit of the doubt in their deliberations. Warren, 134 Wn.App. at 59; 2/20/03RP 42, 98-99. By overruling Warren's objection, however, the trial court essentially endorsed the prosecutor's error concerning this important constitutional right.

Second, the Court of Appeals was under the impression the court gave two limiting instructions when it only gave one. Warren, 134 Wn.App. at 60 n6. The court was apparently confused because the court reporter incorrectly placed the prosecutor's rebuttal closing argument in two separate places in the verbatim report of proceedings. RP 33-48, 89-106. The cautionary instruction was given only once.

The Court of Appeals reasoning is also incorrect. A curative instruction does not necessarily cure the prejudice caused by prosecutorial misconduct. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). A trial court's strongly-worded curative instructions did not cure prejudice caused by the prosecutor's misconduct in State v. Stith, 71 Wn.App. 14, 21-23, 856 P.2d 415 (1993). There, the prosecutor mentioned inadmissible bad conduct evidence in closing argument and later assured the jury that probable cause had already been established and

the criminal justice system had numerous safeguards to prevent police perjury. 71 Wn.App. at 21-22. The Court of Appeals found the trial court's instructions did not cure the prejudice because the comments struck at the heart of the right to a fair trial before an impartial jury and thus could not be cured. Id. at 23. Accord State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor elicited defendant's other bad acts in cross-examination of defendant's character witnesses).

While the court's curative instruction was technically correct, it ended on a tepid note that undermined its curative effect. In a New York case where the prosecutor indirectly commented in closing argument on the defendant's failure to testify or call in closing argument, the court gave a "perfunctory" instruction concerning the defendant's right to remain silent, but immediately "diluted the curative instruction" by stating, "Strange enough, the Law affords him an opportunity to take the stand and give his version if he elects to." People v. Murray, 64 A.D.2d 916, 407 N.Y.S.2d 890, 891 (N.Y.App.Div. 1978). The appellate court found the combination of the prosecutor's argument and the court's response deprived the defendant of a fair trial. Similarly here the trial court diluted

the effect of its curative instruction by added that it was simply playing with words.

The prosecutor's improper argument struck at the heart of Warren's constitutional right to the presumption of innocence and to be convicted only by a jury finding of every element of the crime beyond a reasonable doubt. The trial court initially bolstered the improper argument by overruling Warren's objection. Later the court attempted to correct the problem with a more accurate definition of reasonable doubt, encouraging the jury to read the instruction. The court's well-meaning instruction, however, was watered down by the court's dismissing the discussion as playing with words. This Court should hold the inconsistent curative instruction did not cure the prejudice caused when the deputy prosecuting attorney misstated proof beyond a reasonable doubt in her rebuttal closing argument.

iii. *This Court should review the prosecutor's misconduct in misstating the constitutionally-required presumption of innocence and proof beyond a reasonable doubt utilizing the constitutional harmless error standard.* The Court of Appeals rejected Warren's argument that it should apply the constitutional harmless error standard because the prosecutorial misconduct affected his constitutional right to conviction by a jury finding of every element of the offense beyond a reasonable doubt.

Warren, 137 Wn.App. at 61 n7. On the contrary, prosecutorial misconduct is a constitutional issue because it violates the defendant's constitutional right to a fair trial and due process of law.[14] State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930).

This court, however, reviews prosecutorial misconduct using a standard of review that places the burden on the defendant to demonstrate (1) the prosecutor committed misconduct, and (2) there is a substantial likelihood the misconduct affected the jury verdict. State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); Charlton, 90 Wn.2d at 664. The more stringent constitutional harmless error test is utilized when prosecutorial misconduct in impacts an additional constitutional right, such as the right to remain silent or right to counsel.[15] A prosecutor may also negate a constitutional right by misstating the law in argument. Mahoney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (using

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[14] See State v. Montgomery, 56 Wash. 443, 105 Pac. 1035 (1909) (prosecutor denied fair trial by threatening and intimidating witness, thus denying defendant a fair trial); State v. O'Donnell, 191 Wash. 511, 517-19, 71 Pac. 571 (1937) (reversing despite sufficient admissible evidence to convict defendants, noting the "integrity of our system of administering criminal justice" at stake); Charlton, 90 Wn.2d at 664-65 ("[O]nly a fair trial is a constitutional trial.").

[15] Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (post-arrest silence); Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed2d 106 (1965) (right not to testify); State v. Easter, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996); (pre-arrest silence); State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979) (post-arrest silence); State v. Moreno, 132 Wn.App. 663, 672, 132 P.2d 1137 (2006) (right to self-representation); State v. Fiallo-Lopez, 78 Wn.App. 717, 728-29, 899 P.2d 1294 (1995) (right not to testify); Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (constitutional right to counsel), cert. denied, 469 U.S. 920 (1984).

constitutional harmless error on habeas because prosecutor misrepresented presumption of innocence in voire dire and closing argument). Thus, the Court of Appeals utilized the harmless error standard and reversed the conviction when the prosecutor's closing argument misstated the burden of proof and the role of jury. State v. Fleming, 83 Wn.App. 209, 216, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997).

Here, the prosecutor's closing argument undermined the constitutional standards of presumption of innocence and proof beyond a reasonable doubt. The Court of Appeals, however, rejected the use of the constitutional harmless error standard, citing its opinion in State v. French, 101 Wn.App. 380, 389, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001). In French, however, the prosecutor's arguments mentioned that the defendants had not produced any witnesses and thus were not direct comments on the defendants' right to remain silent. 101 Wn.App. at 386, 389. The French Court concluded the absence of a duty to call witnesses was not a specific constitutional right, but simply "a judicially developed corollary of the State's burden to prove every element of the crime charged beyond a reasonable doubt." Id. at 389, quoting State v. Contreras, 57 Wn.App. 471, 473, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990). In contrast, the right to a jury finding of every element of the crime beyond a reasonable doubt is a specific and long-recognized

constitutional right. The prosecutor's misstatement of the burden of proof beyond a reasonable doubt should be addressed as a constitutional violation.

iv. *Warren's child molestation conviction should be reversed*. The prosecutor's improper argument struck at the heart of Warren's constitutional right to the presumption of innocence and to be convicted only by a jury finding of every element of the crime beyond a reasonable doubt. The trial court initially bolstered the improper argument by overruling Warren's objection. Later the court's well-meaning curative instruction was watered down when the court dismissed the discussion as wordplay.

The constitutional error standard requires the defendant to identify the constitutional error and then places the burden on the government to prove beyond a reasonable doubt the error was not harmless. Chapman v. California, 385 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 288, 242, 922 P.2d 1285 (1996). It includes an evaluation of the incriminating evidence in the record and also reflection upon the effect of the error on a reasonable trier of fact. United States v. Bishop, 264 F.3d 919, 927 (9th Cir. 2001). The prosecutor's misstatement of the presumption of innocence and burden of proof beyond a reasonable doubt is a constitutional violation, and the State cannot demonstrate

beyond a reasonable doubt that it did not contribute to the jury verdict. This Court must reverse Warren's conviction for child molestation.

b. The prosecutor's misconduct in closing argument requires reversal of Warren's convictions in the second trial. The prosecuting attorney also committed misconduct in closing argument during the November 2003 trial where Warren was convicted of offenses against N.S. Although his attorney did not object to the misconduct, it nonetheless violated Warren's constitutional right to due process of law. This Court must reverse it if finds the misconduct so flagrant and ill-intentioned that the resulting prejudice could not have been cured by a limiting instruction. Dhaliwal, 150 Wn.2d at 578; State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

The prosecuting attorney committed misconduct in four ways:

- The prosecutor argued facts not in evidence. Although the State did not offer any expert opinion concerning delayed reporting of sexual abuse, in closing argument the prosecutor asserted that that delayed disclosure is common with children, who carefully decide to whom they reveal sexual abuse. 11/18/03RP 9.

- The prosecutor disparaged defense counsel. The prosecutor complained that Warren's attorney mischaracterized the evidence, explaining that this was "an example of what people go through in the criminal justice system when they deal with defense lawyers." 11/18/03RP 62. Later the prosecutor argued that defense counsel's argument "was a classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." Id.

at 63. Finally the prosecutor suggested that the defense changed its position throughout the trial. Id. at 65-66.

- The prosecutor bolstered her witness's credibility. The prosecuting attorney bolstered N.S.'s credibility by arguing her testimony bore the "badge of truth," "rang out clearly with the truth." 11/18/03RP 12, 13-15.

- The prosecutor violated due process by using evidence to argue a point inconsistent with her theory in the first trial. At the first trial, the prosecutor read portions of Warren's rap lyrics in closing argument to demonstrate his lustful disposition towards S.S. 2/20/03RP 26-27. During the second trial, the prosecutor argued the same lines referred to N.S. 11/18/03RP 33-35. The lyrics were evocative of S.S.'s testimony and Mrs. Warren had testified that the nickname in the lyrics referred to S.S. 2/13/03RP 76 ; 2/18/03RP 93-94, 97-99 .

The Court of Appeals agreed the prosecutor's derogatory comments about defense attorneys and explanation of how children disclose sexual abuse were improper argument, but found Warren could not establish they would not have been cured by an instruction from the court. Warren, 134 Wn.App. at 68-69. The Court of Appeals additionally found the "badge of truth" arguments were a reasonable inference from N.S.'s testimony. Id. at 68-69. Finally, the Court of Appeals held the introduction of the rap lyric in N.S.'s trial was not an abuse of discretion. Id. at 67.

Attorneys may not base their closing argument on facts that were not before the jury. RPC 3.4(e). This is especially true of a public prosecutor due the prestige of her office; reference to facts not before the

jury causes her to act as an unsworn witness for the State. Belgarde, 110 Wn.2d at 508-09; State v. Case, 49 Wn.2d 66, 69, 298 P.2d 500 (1956); American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function § 3-5.9 (3rd ed. 2003).

In holding the prosecutor's remarks were "largely a matter of common knowledge" and could have been addressed by a curative instruction, the Court of Appeals ignored Warren's contention that an objection would be futile. The trial court took the position that the lawyers could not interrupt closing argument to object on the basis that the opponent's argument lacked a factual basis. 2/20/03RP 7-8, 38, 71-72, 94-95; 11/12/03RP 15-16; 11/18/03RP 44. In this circumstance, it was unfair for the Court of Appeals to base its ruling on Warren's failure to object.

Disparaging defense counsel is prosecutorial misconduct which impacts the defendant's constitutional right to counsel. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984). The Court of Appeals ignored the constitutional aspect of the prosecutor's misconduct in finding her comment was "isolated" and thus not prejudicial. Warren, 134 Wn.App. at 69.

This Court should also find that the prosecutor's discussion of N.S.'s testimony was improper because of the "ring of truth" and "badge

of truth" theme. It is unethical for a party to express his personal opinion about the credibility of a witness or the guilt or innocence of the accused. RPC 3.4(f). The prosecutor's duty to ensure fair trial also precludes the prosecutor from personally vouching for a witness. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Finally, the prosecutor's selective use of evidence in order to establish inconsistent factual content in separate criminal proceedings for the same crime may violate due process. See State v. Roberts, 142 Wn.2d 471, 498, 14 P.3d 713 (2000) (criticizing State for inconsistent positions about the truthfulness and reliability of a codefendant's statement in separate trial and appeal of defendant and codefendant).[16] Here, the prosecutor took the same evidence – a few lines in Warren's rap lyrics -- and argued in one proceedings the lines described S.S. and then argued in a separate proceeding the same lines described N.S. This Court should find the prosecutor's misuse of the rap lyric in closing argument at the second trial was prosecutorial misconduct.

The cumulative effect of various instances of prosecutorial misconduct may violate the defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16

[16] Smith v. Groose, 205 F.3d 1045, 1051, 2000 (8th Cir. 2000) (due process protection prevents State from arguing two fundamentally inconsistent theories of codefendant's guilt at their separate trials); Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc) (accord), rev'd on other grounds, 523 U.S. 538 (1998).